

Legal Updates & News

Bulletins

Employment Law Commentary

February 2008

Employment Law Commentary - February 2008



Related Practices:

- [Employment and Labor](#)

In This Issue:

[Employer Obligations Under The FMLA Have Recently Been Expanded To Include Military-Related Leaves
Employers Beware: Labor Code Section 432.5 and the Private Attorneys General Act](#)

Employer Obligations Under The FMLA Have Recently Been Expanded To Include Military-Related Leaves

by [Erika Drous](#)

Employer obligations under the Family Medical Leave Act (“FMLA”) have recently been expanded for the first time since its enactment in 1993. On January 28, 2008, President Bush signed into law the fiscal year 2009 Defense Authorization Act (the “Act”). The Act includes provisions that expand the reasons for family medical leave to include two additional purposes: (1) up to 12 weeks of leave for employees who have a family member called up for engaged in active military duty; and (2) up to 26 weeks of leave for employees who are serving as a caregiver to a family member who was injured or became ill while on active military duty. The Act affects all employers who are subject to the provisions of the FMLA. The Act does not change which employers are subject to the FMLA’s requirements, nor does it change FMLA eligibility requirements.

The FMLA applies to all employers with 50 or more employees on the payroll (including part-timers and employees on leave) in 20 or more workweeks (not necessarily consecutive) in the current or preceding calendar year. The FMLA also applies to public agencies, including state, local, and federal employers, and local education agencies—regardless of employee size.

Under the existing FMLA, covered employers must grant an eligible employee up to a total of 12 workweeks of unpaid, job-protected leave during a 12 month period for any of the following “FMLA-qualifying” events: (1) the birth and care of the employee’s newborn child; (2) the placement of a child with the employee for adoption or foster care; (3) the care of an immediate family member (defined by the FMLA as “child, parent or spouse,” although state and local laws may have broader definitions) with a serious health condition; and/or (4) the employee’s own serious health condition. As noted above, the Act amends the FMLA to add two new entitlements to leave.

Under the Act, employees are now entitled to up to 12 weeks of FMLA leave for “any qualifying exigency” arising out of the fact that the employee’s spouse, daughter, son, or parent is on active duty, or has been notified of an impending call or order to active duty, in the Armed Forces in support of a “contingency operation.”

The term “contingency operation” includes military actions as designated by the Secretary of Defense, involving hostilities against an enemy of the United States, or other calls to duty during times of war or national emergency. The term “qualifying exigency” has not been defined. The Department of Labor (the “DOL”) has

been directed to promulgate regulations defining what constitutes a “qualifying exigency.” While the DOL “encourages” employers to provide eligible employees with leave under this provision, this provision will not take effect until the DOL issues final regulations defining “qualifying exigency.”

When an employee requests leave for a qualifying exigency and the necessity for the leave is foreseeable, the employee must provide the employer with “reasonable and practicable” notice. Additionally, an employer may require that a request for leave for a qualifying exigency be supported by a certification that the service member is on active duty or has been called to active duty.

The Act also provides up to 26 weeks of FMLA leave during a single 12-month period for eligible employees (a spouse, child, parent, or *next of kin*) to care for a covered service member. This is more than double the 12 weeks that is provided when an employee takes traditional FMLA leave. An employee is entitled to only one 26-week leave period to care for a covered service member during his or her employment. The leave can be taken on an intermittent basis, but must be used during a single 12-month period.

“Covered service member” means a service member who is “undergoing medical treatment, recuperation, or therapy, is otherwise in an outpatient status, or is otherwise on the temporary disability retired list, for a serious illness or injury.” “Serious illness or injury,” in turn, is defined as a condition that may render the service member “medically unfit to perform the duties of the member’s office, grade, rank, or rating.” Employers should be aware that a “serious illness or injury” is different from the “serious health condition” that is required for traditional FMLA leave.

As noted above, the Act expands FMLA coverage to “*next of kin*,” which includes the nearest blood relative of an individual. This allows a broader definition of “family” and goes beyond the original definition of an “immediate family member” set forth in the FMLA. For example, the original FMLA provisions would not cover the situation in which an employee took time off to care for his or her sibling. However, now, eligible employees may take time off to care for a sibling who is injured, or becomes ill, in the line of duty.

During any 12 month period, an eligible employee is entitled to a maximum combined total of 26 weeks of leave to serve as a caregiver to a family member who was injured or became ill while on active military duty, and any of the now five entitlements to 12 weeks of leave.

The Act expands the circumstances under which employees are now entitled to FMLA leave. The Department of Labor is working quickly to prepare comprehensive guidance regarding employers’ rights and responsibilities under the new legislation. In the interim, employers should continue to comply with current FMLA procedures regarding substitution of paid leave, notice, and reinstatement.

Erika Drous is an associate in our Los Angeles office and can be reached at 213.892.5726 and edrous@mofo.com.

Employers Beware: Labor Code Section 432.5 and the Private Attorneys General Act

By [Marc Fernandez](#)

A California Court of Appeal recently allowed two foreign nurses to proceed with claims under the California Private Attorneys General Act, on behalf of themselves and others, against a staffing agency for failure to pay the prevailing wage provided by the Labor Department and for requiring illegal employment agreements. *Sinolinding v. United Staffing Solutions Inc.*, No. B194344; *Bascug v. United Staffing Solutions Inc.*, No. B194899, 2008 Cal. App. Unpub. LEXIS 305 (Jan. 15, 2008). Notably, the court found that a plaintiff can bring such a claim without having to meet the requirements for bringing a class action, and under a code section that can be used to question any documents employees are asked to sign.

The staffing company recruited the two nurses from the Philippines to work in California and told them that they would be paid at the prevailing wage set by the Labor Department. However, the company had the nurses sign employment agreements providing wage rates below the prevailing rate. The agreements also required the nurses to reimburse the company \$20,000 for recruiting and training if the nurses breached the contract.

The nurses relocated to the United States and worked under the terms of the agreement for several months.

Upon learning the true prevailing rate, the nurses quit their jobs and sued the company, alleging nine causes of action. Among these were claims on behalf of the nurses and all persons similarly situated under California Labor Code section 2699, the California Private Attorneys General Act. Underlying these enforcement claims were plaintiffs' allegations that the company violated Labor Code section 432.5, which prohibits requiring an employee to agree in writing to a term or condition of employment known by the employer to be prohibited by law, and also violated Labor Code section 1197, which prohibits payment of wages below minimum wage. Specifically, the nurses asserted that the company failed to pay prevailing wages and forced prospective employees to sign employment contracts that required work to be performed for less than the prevailing wage and contained illegal penalty provisions in the guise of liquidated damages.

The staffing agency demurred, arguing that failure to pay the prevailing wage provided by the Department of Labor was not prohibited by law and therefore not actionable under section 432.5. The company also argued that the plaintiffs had failed to satisfy the procedural requirements for bringing a claim under section 2699 or for bringing a class action. The trial court agreed with the company, and the plaintiffs appealed.

On appeal the trial court's decision was reversed. First, the appellate court found that the plaintiffs had stated a cause of action for a violation of section 2699. In order to bring a claim under section 2699, the plaintiff must allege an underlying violation of the Labor Code that provides a penalty. Because there is no civil penalty provided by section 432.5, the trial court found that the claim did not fall under the purview of section 2699. However, the appellate court referenced section 2699(f), which provides for a penalty for provisions like section 432.5 that do not have a penalty specifically provided. Further, section 2699.5 specifies that section 432.5 can be the basis for a section 2699 claim.

Similarly, the appellate court reversed the trial court's ruling that the plaintiffs did not meet the procedural requirements of section 2699.3 as required by section 2699. These include notifying the employer and the Labor and Workforce Development Agency of the specific code provisions violated. Since the notice identified section 432.5 and the appellate court found that this code was indeed actionable under section 2699, the plaintiffs met this procedural requirement.

Finally, the appellate court found that the plaintiffs did not need to comply with class action requirements to bring a claim under section 2699. The court based its ruling on the statutory language of section 2699. First, section 2699 allows an aggrieved employee to bring a claim "on behalf of himself or herself and other current and former employees." The statute makes no reference, explicit or implicit, to any of the requirements for bringing a class action. Next, section 2699 provides that it applies "notwithstanding any other provision of law," which has been interpreted to express a legislative intent to override all contrary laws. Finally, the court pointed to other similar provisions in the Business and Professions Code, which explicitly state that the requirements for bringing a class action must be met. Although this decision provides some indication of the direction of the law on this issue, the California Supreme Court has granted review on the only previously published case on the issue, *Arias v. Superior Court*, No. S155965 (rev. granted Oct. 10, 2007). The lower court in *Arias* found that a plaintiff can bring an action under section 2699 without complying with the requirements necessary for bringing a class action. Once the Supreme Court issues its ruling, there should be a definitive answer on this issue.

Employers should be aware that, under *Sinolingding*, some common practices may give rise to claims under the Private Attorneys General Act. For instance, many employers include some form of a noncompetition agreement or arbitration agreement with restrictive provisions in their employment agreements. However, these agreements (or certain provisions in them) may be unenforceable. Although there are large questions of how an employee would prove employer knowledge of an illegal term or condition, an employee could certainly bring a claim under section 432.5 that the employer knowingly included an illegal term in an employment agreement, and could plead it as a group claim under the Private Attorneys General Act. Employers may want to review the documents they ask employees to sign to be sure there are no provisions that could pose a potential problem under Labor Code section 432.5.

Marc Fernandez is an associate in the Labor and Employment Group in the Palo Alto office. He can be reached at 650.813.4239 or mfernandez@mofo.com.